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INTRODUCTION.

This Supplemental Brief is filed by appellants pursuant to Supreme Court Rule 41(5) to bring to the attention of this Court recently discovered facts concerning related litigation now pending between the Philadelphia-Montgomery Christian Academy (the "Academy") and education officials of the Commonwealth of Pennsylvania, all of whom are defendants-appellees in the instant case. This related litigation, captioned *William Viss, et al. v. John Pittenger, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, et al.*, E. D. Pa., Civ. Action No. 72-332, arose out of the Commonwealth's decision—communicated to the Academy on July 29, 1970, a year before this Court's ruling in *Lemon v. Kurtzman*, 403 U. S. 602 (1971)—to declare the Academy and certain other nonpublic schools ineligible for further state aid under Pennsylvania Act 109.

The Academy filed suit on February 15, 1972 to reverse that determination, but it was not until July 14, 1972, nine days after appellants submitted their Brief to this Court in the case at bar, that an opinion of record was issued by the District Court in dismissing the Complaint.[1] Indeed, counsel for appellants was not informed even of the existence of this related litigation until October 18, 1972. An appeal therein is now pending before the United States Court of Appeals for the Third Circuit, No. 72-1807.

This litigation bears significantly on the instant appeal because it illustrates—perhaps more effectively than hypothetical argument—two of the major propositions here advanced by appellants: first, that further disbursements of

1. Copies of the relevant documents of record in the *Viss* case, consisting of the Complaint, defendants' Motion to Dismiss or, in the Alternative, to Stay All Proceedings, and the Memorandum and Order of the District Court dated July 14, 1972, are attached hereto as Exhibits "A", "B" and "C", respectively.

public funds to sectarian schools under Pennsylvania Act 109 will inevitably promote the very entanglement between church and state which this Court forbade in holding Act 109 unconstitutional on its face, and second, that the so-called "contracts" signed by the schools to obtain reimbursement for "services" rendered prior to the decision of this Court in *Lemon* do not furnish any basis for additional disbursements.

The relevant facts are these, as disclosed by the pleadings attached hereto: Act 109 was adopted on July 19, 1968. Rules and regulations for implementing the Act were not issued until December, 1968.[2] Thereafter the Academy and other nonpublic schools entered into "contracts" with the state to receive payments under the Act for "services" rendered during the 1968-69 school year. Under Act 109 those payments were made to the Academy and the other schools in the following school year, commencing in September 1969.

The Academy then executed another "contract" with the Commonwealth to provide reimbursement for "services" rendered in the 1969-70 school year. On July 29, 1970—*after all of the 1969-70 "services" had been provided by the Academy pursuant to the "contract"*—the Commonwealth's Department of Public Instruction announced to the Academy that no further payments would be made, even in respect of the completed 1969-70 school year, because the Academy's By-laws and public brochures contained a reference to God's revelation and creation as affecting its teaching. Despite the Academy's repeated efforts to persuade

2. In fact, the regulations were not formally approved until January 14, 1969. Applications could not even be solicited until after that time. This delay in implementing the statute accounts for the fact that plaintiffs did not file suit challenging the constitutionality of Act 109 until July 3, 1969. Had the complaint been filed much before then, it would have been open to challenge as premature because no funds had yet been committed for payments under Act 109.

the Commonwealth that its decision was erroneous, and that every Catholic parochial school in the state of Pennsylvania would be rendered ineligible for aid under the standard applied to the Academy, the decision of the Commonwealth was not reversed.

The Academy and several tax paying parents of children enrolled at the school thereupon commenced a class action on behalf of the Academy and all other similarly situated schools, seeking (a) to convene a three-judge court to consider alleged constitutional claims; (b) to enjoin all further payments under Act 109 until the rights of the class had been determined; and (c) to require the state to "reinstate the contract" with the Academy. On April 14, 1972, defendants filed a motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted or, in the alternative, for a stay pending the decision of this Court in the instant appeal.

On July 14, 1972, the District Court (per Troutman, J.) dismissed the complaint, holding that (1) there was no need for a three-judge court because this Court had already held Act 109 unconstitutional on its face, (2) the plaintiffs had no "contract" with the state in respect of "services" provided during the 1970-71 school year and therefore could not claim that any expenditures had been made in reliance on such a contract, and (3) the court was powerless to order an administrative hearing on the Academy's claim because this would foster the very entanglement proscribed by this Court in *Lemon*. In conclusion, the District Court suggested that the issue raised by the Academy should have been earlier presented in the instant litigation before Act 109 was declared invalid. Significantly, however, the District Court did not even mention the Academy's claim to reimbursement for "services" rendered in the 1969-70 school year—a year for which the school *had* executed a "con-

tract" with the state and fully performed "services" thereunder.[3]

3. Paragraph 14 of Exhibit "A", attached hereto.

ARGUMENT.

A. Further Disbursements Under Act 109 Will Promote Church-State Entanglement.

The troublesome issues raised raised by the *Viss* case validate the perception of this Court in *Lemon* that state aid to sectarian schools under Act 109 necessarily involves church and state in a relationship detrimental to both. But more important for the present appeal, the case also illustrates why the prior ruling in *Lemon* cannot obviate continuing constitutional difficulties if further disbursements are to be made under the Act.

Appellants have argued that $24 million cannot—consistently with this Court's decision in *Lemon*—be dispensed to 1,181 nonpublic schools without careful appraisal of the exact degree of religious involvement in the administration, curriculum and operation of each institution. Such scrutiny, it is suggested, will unavoidably involve entanglement. Appellees have responded that this suggestion is fanciful because the 1970-71 school year is over and

> "the Commonwealth, in determining a school to be eligible for reimbursement, must be conclusively presumed to have made a determination that such school in no wise violated the statutory and constitutional obligation of secularity of instruction." (Brief for Commonwealth of Pennsylvania and Appellee Schools, p. 20).

The *Viss* case, however, casts a somewhat different light on the matter. The Director of the Commonwealth's Office for Aid to Nonpublic Education, Vincent McCoola, has simply excluded—without any administrative hearing—a number of nonpublic schools on the apparent basis of a

sentence or two in the by-laws and public brochures of those institutions. Such an administrative approach scarcely meets the concerns which underlay this Court's decision in *Lemon*. In light of *Viss*, and the absence of any rebutting evidence whatsoever from the Commonwealth on this point, it simply cannot be presumed conclusively that the state has done all that needs to be done to ensure that public funds will not be used for unconstitutional purposes. On the contrary, it appears that state funds may be disbursed without any meaningful inquiry—either before or after the *Lemon* ruling—to insure that religious teaching and practice will not be subsidized.

Nor does the problem end there. As the District Court recognized in *Viss*, there is absolutely no way to set up an administrative review of the state's decision to declare the Academy ineligible for aid, without thereby promoting the most egregious form of unlawful entanglement; i.e., governmental scrutiny of the school's curriculum, philosophy and practice to determine if certain subjects were taught in a truly secular manner. The apparent injustice resulting to the Academy from the state's arbitrary decision is only compounded by permitting wholesale disbursement of funds to other schools which—as appellees' counsel would be the first to recognize—are equally ineligible for state aid under the standard invoked by the Commonwealth to exclude the Academy.

There is only one satisfactory solution to all of these vexing difficulties: full prospective compliance with the mandate of *Lemon*. Act 109 has been found unconstitutional on its face and all further subsidies thereunder to any sectarian schools should be prohibited.

B. The Commonwealth of Pennsylvania Has, by Its Own Conduct, Established That the So-Called "Contracts" Do Not Justify Further Disbursements Under Act 109 to Sectarian Schools.

The Brief filed in this Court on behalf of the Commonwealth of Pennsylvania devotes eight pages to the proposition that the Commonwealth has entered into a true and binding contractual relationship with sectarian schools, a relationship which it is said the Commonwealth must now honor by making further disbursements to the schools under Act 109 (Brief, pp. 11-18). Once again, the argument is undercut by the facts disclosed in the *Viss* case.

As stated above, the Academy entered into a "contract" with the Commonwealth to perform reimbursable "services" during the 1969-70 school year. On July 29, 1970, long after the performance of those "services", the Commonwealth unilaterally announced that payments would not be made for the 1969-70 school year or thereafter. Nothing was said about the sanctity of "contract", or the prior good faith "reliance" by the Academy on subsequent reimbursement. Nor has the Commonwealth altered its position to this day.

In evaluating the true effect and meaning of a legislative arrangement—no less than in judging the conduct of a nation's foreign affairs—it is instructive to watch what a government does, not what it says. The earlier actions of the Commonwealth in the *Viss* case speak far louder than its words in the case at bar. The action of the Commonwealth in cutting off further payments to the Academy after July 29, 1970, even in respect of "services" already performed, is utterly inconsistent with any notion of contractual or equitable obligation. But it *is* consistent with the view expressed by this Court in *Lemon*: the payments under Act 109 are straightforward governmental subsidies

which can and should be terminated whenever it is found that the payments, or the entire scheme for administering them, are constitutionally defective. Appellants submit that this Court should accord no more weight to the Commonwealth's claim of "contractual obligation" than has the Commonwealth itself in denying funds to the Academy. Manifestly, these "contracts" do not warrant any circumvention of the normal prospective effect to be accorded the ruling of this Court in *Lemon*.

CONCLUSION.

For all of the foregoing reasons, the Order of the lower court should be reversed insofar as it permits the further disbursement of any funds, under and pursuant to Act 109, to any religious or church-related school.

Respectfully submitted,

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EXHIBIT "A".

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-332.

WILLIAM VISS, FRANK HAMEL, JR., JOHN J. MITCHELL, AND PHILADELPHIA-MONTGOMERY CHRISTIAN ACADEMY

v.

JOHN PITTINGER, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, AND VINCENT McCOOLA, AS DIRECTOR, OFFICE FOR AID TO NONPUBLIC EDUCATION

COMPLAINT.

I. STATEMENT OF JURISDICTION.

1. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. Section 1343(3) and (4) as this is a suit in equity authorized by 42 U. S. C. Section 1983 to redress the deprivation under color of law or [*sic*] rights, privileges and immunities secured by the Constitution and laws of the United States, and is also invoked pursuant to 28 U. S. C. 2281, 2284, 2201, 2202, and 1331(a).

II. NATURE OF ACTION.

2. This is a class action seeking to enjoin the Defendants from making any further payments under or pursuant

to Act 109 (Act of June 19, 1968) to any school until the rights of Plaintiff institution and all others similarly situated have been determined by your Honorable Court, and to protect Plaintiff individuals and all others similarly situated in their freedom of expression and to redress the deprivation under color of law of rights, privileges and immunities secured by the Constitution and laws of the United States of all Plaintiffs.

3. Philadelphia-Montgomery Christian Academy is a party Defendant in the related case of Lemon v. Kurtzman, No. 69-1206, before your Honorable Court.

III. Parties.

4. Individual Plaintiffs are citizens of the United States of America and of the Commonwealth of Pennsylvania; are residents of the Eastern District of the United States Federal Court District in Pennsylvania; and are tax payers of Federal and State taxes. All of the individual Plaintiffs are parents of pupils in Philadelphia-Montgomery Christian Academy.

5. Philadelphia-Montgomery Christian Academy is a Pennsylvania Non-profit Corporation situate and operating within the Eastern District of Pennsylvania, carrying on a private school with grades from kindergarten through twelve, and satisfies the requirements of the compulsory education law of the Commonwealth of Pennsylvania, and is approved by the Private Academic Board of the Commonwealth of Pennsylvania. Philadelphia-Montgomery Christian Academy is bringing this action on its own behalf and on behalf of all other schools similarly situated pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure.

6. Defendant, John Pittinger, is Superintendent of Public Instruction of the Commonwealth of Pennsylvania

and is sued herein in that capacity. Defendant, Grace Sloan, is State Treasurer of the Commonwealth of Pennsylvania and is sued herein in that capacity. Vincent McCoola is Director, Office for Aid to Nonpublic Education.

IV. Factual Allegations.

7. On June 19, 1968, the Governor of the Commonwealth of Pennsylvania signed into Law Act 109 of the Laws of Pennsylvania, 1968, known as the Nonpublic Elementary and Secondary Education Act, effective July 1, 1968, hereinafter referred to as the Act. The Act empowered the State Superintendent of Public Instruction to contract for the purchase of secular educational services from non-public schools located in the Commonwealth of Pennsylvania and authorized him to promulgate rules and regulations to effectuate this purpose.

8. In December, 1968, the Defendant, David H. Kurtzman, (predecessor of John Pittinger) in his capacity as State Superintendent of Public Instruction of the Commonwealth of Pennsylvania and acting pursuant to the authority of the Act, issued Rules and Regulations for the effectuation of the purposes of the Act.

9. Philadelphia-Montgomery Christian Academy, together with such other schools as, but not limited to, William Penn Charter, St. Anthony's Roman Catholic School, Archbishop Wood's Girl's High School, Cardinal Dougherty, entered into a contract with the State pursuant to said Act.

10. The State Superintendent of Public Instruction approved for payment various amounts to contracting schools, including Philadelphia-Montgomery Christian Academy, and payment thereon was made by the Commonwealth.

11. During the year 1969 an action was filed with Your Honorable Court entitled Lemon v. Kurtzman, No. 69-1206, seeking to have the Act declared unconstitutional. In that action, Philadelphia-Montgomery Christian Academy was one of seven named schools joined as Defendants.

12. Your Honorable Court found the Act to be constitutional, 310 F. Supp. 35, and the Supreme Court of the United States reversed on June 28, 1971.

13. Further proceedings were held before your Honorable Court wherein an Order was entered December 28, 1971, enjoining Defendants herein from paying funds pursuant to Act 109 for services performed after June 28, 1971, "to any school which is church related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose". Plaintiff in said case has appealed from that Order.

14. On July 29, 1970, the Department of Public Instruction informed Philadelphia-Montgomery Christian Academy that "your institution is not entitled to compensation for services rendered under said Act", thereby avoiding the contract entered into between Philadelphia-Montgomery Christian Academy and the Department of Public Instruction for the school year 1969-1970.

15. The decision of the Department of Public Instruction was made without any hearing or opportunity for Philadelphia-Montgomery Christian Academy to be heard, and without explanation of the grounds of such decision.

16. An identical letter was sent to the Middletown Christian School under the same date as that sent to Plaintiff.

17. Thereafter, Plaintiff's chief executive officer was informed orally on September 29, 1970, by Vincent J. Mc-

Coola, Director of Office for Aid to Nonpublic Schools, that all independent protestant Christian Schools, such as Plaintiff, were not to be compensated under the Act because it was "not possible for such schools to comply with the Act". Further, Mr. McCoola stated that Plaintiff had "existed without aid before Act 109 and I see no reason why it needs aid now".

18. Plaintiff school was informed by the Director of the Office for Aid to Nonpublic Schools, under date of November 10, 1970, that its by-laws must be changed to eliminate any reference to God's revelation and creation as affecting its teaching, that its public brochures must eliminate any such references and specifically indicate that its subjects are taught so that "secularity is definitely maintained by your institution".

19. Plaintiff avers that it complied with Act 109 without making the changes requested by the Defendant through the Office for Aid to Nonpublic Schools.

20. Plaintiff and other institutions similarly situated were singled out for treatment distinct from William Penn Charter, Episcopal Academy, Cardinal Dougherty, Archbishop Wood's High School for Girls, and other nonpublic schools who carry on education in accordance with its individual philosophy in an identical manner to Plaintiff.

21. Despite the Encyclical of Pope Pius XII, in his 1925 Encyclical on the Christian Education of Youth, which declares authoritatively that "it is necessary that all teaching and the whole organization of the school, and its teachers, syllabus, and textbooks in every branch, be regulated by the Christian (i.e. Catholic) spirit under the direction and maternal supervision of the Church; . . . and this in every grade of school, not only the elementary, but the intermediate and higher institutions of learning as well.

'For it is necessary', if we may use the words of Leo XIII (Enc. Militantis Ecclesiae, 1897) not only at certain hours to teach Catholic religion to children but that every other subject be permeated with Christian piety", Catholic schools, such as Cardinal Dougherty and hundreds of others, have continued to be permitted to enter into contracts with Defendant, whereas Plaintiff has, since July of 1970, been refused such equal treatment.

22. All of the individual Plaintiffs state that the actions of the Superintendent of Public Instruction are repugnant to and in violation of the rights of Plaintiff insofar as they infringe upon Plaintiff's rights of freedom of expression, freedom of education, equal protection of the laws, due process of law and other constitutional rights afforded them.

23. The selective benefit dispensing policies of Defendant Superintendent of Public Instruction in the matter of the administration of funds allocated to nonpublic schools constitute an abridgment of Plaintiff institution's rights and privileges and individual Plaintiff's rights and privileges.

24. The selective benefit dispensing policies of Defendant Superintendent of Public Instruction under the Act advances non religion over religion, and has as its primary purpose and effect the advancement of one religion over all other religions.

25. The Act as applied violates the Fourteenth Amendment to the United States Constitution in that it constitutes a denial of the equal protection of the law and the free exercise of religion.

IV. Other Allegations.

26. This suit involves a genuine case or controversy between the Plaintiffs and the Defendants.

27. The Plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

WHEREFORE, the Plaintiffs pray that the following relief be granted:

A. That a three-judge Court be convened as provided in Title 28, Sections 2281 and 2283 of the U. S. Code to declare unconstitutional the Pennsylvania Nonpublic Elementary and Secondary Education Act as applied by the Defendant State Superintendent of Public Instruction and the Defendant State Treasurer.

B. That the Defendant State Superintendent of Public Instruction be enjoined from approving the payment of any funds under the Act or otherwise participating in its administration, and the Defendant State Treasurer be enjoined from paying any funds pursuant to the Act until the rights of Plaintiff institution and all other institutions similarly situated have been determined.

C. That the Defendant State Superintendent of Public Instruction be enjoined from depriving Plaintiffs under color of law of the rights, privileges and immunities granted to them by the Constitution and the laws of the United States.

D. That the Defendant State Superintendent of Public Instruction be ordered to reinstate its contract with Philadelphia-Montgomery Christian Academy and all other institutions similarly situated for purchase of services pursuant to Act 109 from 1969 to June 28, 1971; and distribution of Act 109 funds include Plaintiff and such other schools.

E. That a preliminary injunction pending the trial of the issues be granted to the Plaintiffs against the Defendants for the relief set forth herein.

F. That the Plaintiffs be granted such other and further relief as the Court may deem just and proper.

SEMISCH AND DERMOVSESIAN,

By: DONALD SEMISCH,
Counsel for Plaintiff.

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Attorneys at Law,
408 North Easton Road,
Willow Grove, Pennsylvania. 19090

EXHIBIT "B".

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-332.

WILLIAM VISS, FRANK HAMEL, JR., JOHN J. MITCHELL, AND PHILADELPHIA-MONTGOMERY CHRISTIAN ACADEMY,
Plaintiffs

v.

JOHN PITTENGER, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, AND VINCENT MCCOOLA, AS DIRECTOR, OFFICE FOR AID TO NONPUBLIC EDUCATION,
Defendants

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY ALL PROCEEDINGS.

AND Now, this day of April, 1972, defendants, John Pittenger, Secretary of Education of the Commonwealth of Pennsylvania, Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania and Vincent McCoola, Director of the Office for Aid to Nonpublic Education, by their attorneys, respectfully move the Court as follows:

1. To dismiss the complaint:

(a) for lack of jurisdiction over the subject matter;

(b) for failure to state a claim upon which relief can be granted;

or

2. To stay all proceedings in this Court and abstain from further action and consideration of this matter until the United States Supreme Court, in the case of *Lemon et al v. Kurtzman et al,* (appeal filed January 11, 1972; District Court Civil Action No. 69-1206), has decided whether those church related schools having contracts with the Commonwealth of Pennsylvania under the Nonpublic Elementary and Secondary Education Act, 42 P. S. § 5601-5609 may be reimbursed for services performed or costs incurred subsequent [*sic*] to June 28, 1971.

Movants respectfully request that they be allowed to present oral argument in support of their motion.

Respectfully submitted,

J. SHANE CREAMER,
Attorney General,
J. JUSTIN BLEWITT, JR.,
Deputy Attorney General,
Attorneys for Defendants.

State Capitol
Harrisburg, Pa.

EXHIBIT "C".

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 72-332.

WILLIAM VISS, FRANK HAMEL, JR., JOHN J. MITCHELL, AND PHILADELPHIA-MONTGOMERY CHRISTIAN ACADEMY

v.

JOHN PITTENGER, AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE COMMONWEALTH OF PENNSYLVANIA, GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, AND VINCENT MCCOOLA, AS DIRECTOR, OFFICE FOR AID TO NONPUBLIC EDUCATION

MEMORANDUM AND ORDER.

TROUTMAN, *J.* July 14, 1972

On June 19, 1968, the Pennsylvania Nonpublic Elementary and Secondary Education Act, 24 P. S. § 5601 et seq. (Supp. 1969), [the Act], providing state aid to nonpublic schools for teachers' salaries, textbooks and instructional materials, was signed into law. Under the statutory scheme, the State Superintendent for Public Instruction was empowered to enter into contracts with nonpublic schools for the purchase of "secular educational services". Thereafter, the Superintendent promulgated rules and regulations and entered into contracts with the state's nonpublic schools, including Philadelphia-Montgomery Christian Academy, the present plaintiff. Philadelphia-Montgomery Christian Academy is allegedly a private school, operated by a board

of directors elected by the parents of the students. Plaintiffs aver that the school is not under the jurisdiction of any church or religious organization. On July 29, 1970, the State notified plaintiff school that it was "not entitled to compensation for services rendered under said Act" and, consequently, declared its contract null and void. The ostensible basis for the termination of plaintiff's contract was the reference in the institution's by-laws and brochures that God's revelation and creation affected its teaching. Therefore, the ground for the invalidation of the contract was, in essence, that the school's secular teaching was permeated with religious thought. Subsequently, on June 28, 1971, the Supreme Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), held the Act unconstitutional on its face, on the ground that the statute fostered an excessive governmental entanglement with religion. 403 U. S. at 614. On remand, this Court entered summary judgment for the plaintiffs and enjoined any payment to nonpublic schools under the Act for services performed or costs incurred subsequent to June 28, 1971.

In their complaint, plaintiffs allege that they have been deprived of rights, privileges and immunities secured by the Constitution in that: (1) the Act has been unconstitutionally applied to them, denying them their right to equal protection of the law and the free exercise of religion and (2) they were deprived of their right to due process of law under the Act in that their contract was terminated without a hearing. Plaintiffs seek to convene a three-judge court pursuant to 28 U. S. C. § 2281 to declare the Act unconstitutional as applied to plaintiffs, to enjoin the payment of funds under the Act to nonpublic schools for services performed and costs incurred prior to June 28, 1971, and to require the State to reinstate the contract with plaintiffs. Before the Court is the Commonwealth's motion to dismiss the complaint.

Initially, we must consider plaintiffs' application to convene a three-judge court. The manifest purpose of Section 2281 is to prevent a single judge from improvidently invalidating or enjoining as unconstitutional a statute embodying important state legislative policy. *Phillips v. United States*, 312 U. S. 246 (1941). In *Lemon*, the Supreme Court held this very Act unconstitutional on its face. Thus, the purpose of Section 2281 would not be served in this case. Clearly, the statute does not contemplate that another three-judge court determine the constitutionality of the Act on other grounds. Moreover, since the Act has already been held unconstitutional on its face, we conclude that the plaintiffs' claim that the Act is unconstitutional as applied is manifestly insubstantial and, therefore, does not support the jurisdiction of a three-judge court. *Swift & Co. v. Wickham*, 382 U. S. 111, 115 (1965). Accordingly, plaintiffs' application for a three-judge court will be denied.

On December 28, 1971, we entered summary judgment for plaintiffs in Lemon and enjoined payments for services performed and costs incurred subsequent to June 28, 1971. The gravamen of plaintiffs' claim is that they were deprived of their contract with the State without a hearing and, therefore, denied due process of law. The ultimate relief which plaintiffs seek is the reinstatement of their contract, entitling them to receive payment for expenditures made prior to June 28, 1971. On remand, we were faced with the issue in *Lemon v. Kurtzman*, — F. Supp. —, (E. D. Pa. 1972) whether the Supreme Court's determination of the Act's unconstitutionality was to be applied retroactively, thereby precluding payments to nonpublic schools for services rendered prior to June 28, 1971. We concluded that in order to prevent hardship and injustice to the nonpublic schools who in reliance on their contracts

with the State had already performed the services and made the expenditures required by such contracts, the Supreme Court's decision would be given prospective application, thereby permitting reimbursement for the school year 1970-1971. In the instant case, plaintiffs had no contract for the school year 1970-1971, have alleged no expenditures in reliance on any contract, and suffered no hardship by reason of the Supreme Court's decision holding the Act unconstitutional. Even assuming arguendo, that plaintiffs were deprived of their contract without a hearing, the necessary elements of expenditures, reliance and hardship are lacking. We find it impossible, on any theory, to justify payments under an act now declared unconstitutional on its face, to one, who had no contract thereunder, made no expenditures in reliance thereon and, therefore, suffered no hardship by reason of the Supreme Court's decision. To do otherwise would defeat the purpose and rationale of our decision; i.e., to prevent hardship or injustice to those schools which actually made expenditures in justifiable reliance on an act held valid at the time, but subsequently declared unconstitutional.

Moreover, this Court lacks the power to order defendant to reinstate plaintiffs' contract. The only feasible relief which could be afforded to plaintiffs would be to order that a hearing be held by the State to determine whether they, in fact, did qualify for reimbursement under the Act. To do so, however, would run afoul of the Supreme Court decision in that the State would be compelled to determine whether the school is a religious or non-religious institution and, thereby, foster the very entanglements which the Court sought to avoid. Philadelphia-Montgomery Christian Academy was a named defendant in the original action in *Lemon v. Kurtzman*, 310 F. Supp. 35 (E. D. Pa. 1969) and continued in that capacity throughout the duration of

the litigation. It was at that time, rather than subsequent to an adverse decision by the Supreme Court, that this present issue should have been raised. Accordingly, defendants' motion to dismiss the complaint will be granted.

ORDER.

And Now, this 14th day of July, 1972, It Is Ordered that plaintiffs' application to convene a three-judge court is Denied. It Is Further Ordered that defendants' motion to dismiss the complaint is Granted.

E. Mac Troutman, *J.*